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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COLLEGIUM FUND, LLC, SERIES 5, a Nevada)	
limited liability company,)	Case No.: 2:13-cv-01550-GMN-VCF
Plaintiff,)	
v.)	
WELLS FARGO BANK, N.A.; HOUSING AND)	
URBAN DEVELOPMENT; ADELE KADANS;)	
DOROTHY L. KEMP; DONALD R. KEMP;)	
RAFAEL GIRALDO; LEONA MARTIN; and)	
DOES I through X inclusive,)	
Defendants.)	

UNITED STATES' MOTION TO DISMISS

The United States of America, acting by and through Secretary Shaun Donovan, Secretary of the United States Department of Housing and Urban Development ("HUD"), hereby moves to dismiss the Complaint in this action (ECF No. 1) under Fed. R. Civ. P. 12(b)(6), because the complaint fails to state a claim upon which relief can be granted. This Motion to Dismiss is supported by the accompanying memorandum of points and authorities and exhibit attached to it.

Respectfully submitted this 3rd day of February 2014.

DANIEL G. BOGDEN
 United States Attorney

/s/ Troy K. Flake
 TROY K. FLAKE
 Assistant United States Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The property at 324 Wild Plum Lane, Las Vegas, Nevada (the “Property”) secures a promissory note belonging to HUD with a balance of \$307,774.32. On July 12, 2013, Plaintiff alleges it paid \$10,600.00 for its interest in the Property at a non-judicial foreclosure sale. HUD did not have notice of this sale. Plaintiff now claims that the non-judicial foreclosure extinguished HUD’s interest in the Property and that this court should quiet title in Plaintiff’s favor.

HUD obtained its interest in the property through a nationwide lending program designed to assist elderly homeowners. HUD respectfully requests that the court dismiss the Complaint because federal law protects HUD’s interest from non-judicial foreclosure. The Complaint also fails to state a claim under state law because foreclosure of an assessment lien under NRS 116.3116 does not extinguish the first security interest.

II. BACKGROUND

Defendant Kadans took title to the Property in March of 1996 (ECF No. 1, Ex. B at Ex. 3). In January 2005, Kadans executed a Deed of Trust in favor of Wells Fargo as security for a Note in the amount of \$400,500.00 (ECF No. 1, Ex. B at Ex. 4). The Deed of Trust was insured by HUD pursuant to the Home Equity Conversion Mortgage (“HECM”) program as set forth in § 255(a) of the National Housing Act, Public Law 73-479, 48 Stat. 1246 (12 U.S.C. § 1715(z-20)) (ECF No. 1, Ex. B at Ex. 6). On September 3, 2008, Wells Fargo recorded an assignment of the Deed of Trust to HUD (ECF No. 1, Ex. B at Ex. 5).

In March of 2012, Kadans passed away.¹ On October 17, 2012, the HOA, through its agent Nevada Association Services, recorded a Notice of Delinquent Assessment Lien on the Property for \$2,693.60 because the HOA assessments had not been paid since around the time of Kadans’ death (ECF No. 1, Ex. B at Ex. 8). On December 21, 2012, the HOA recorded a Notice of Default and

¹ See Adele Kadans Obituary at <http://obits.reviewjournal.com/obituaries/LVRJ/obituary.aspx?n=Adele-Kadans&pid=156442338>. Courts may take judicial notice of a person’s death based on a newspaper obituary. See *Wilson v. Gordon & Wong Law Grp., P.C.*, 2013 WL 6858975 (E.D. Cal. Dec. 24, 2013).

1 Election to Sell, listing a delinquency of \$3,922.60 (ECF No. 1, Ex. B at Ex. 9). On June 17, 2013, the
2 HOA recorded a notice of foreclosure asserting a delinquency of \$6,039.70 and setting a sale for July
3 12, 2013 (ECF No. 1, Ex. B at Ex. 10). HUD asserts that neither it nor its contractor received any of
4 these notices and Plaintiff has provided no evidence to the contrary.

5 On June 18, 2013, HUD, acting through Cimarron Service Corp., recorded a Notice of Default
6 and Foreclosure sale, setting a date of August 13, 2013 (ECF No. 1, Ex. B at Ex. 6). The HOA's non-
7 judicial foreclosure sale occurred on July 12, 2013, and the HOA's interest in the Property was sold to
8 Plaintiff for \$10,600.00 (ECF No. 1, Ex. B at Ex. 2).

9 On August 6, 2013, Plaintiff filed an action in the District Court, Clark County, Nevada, seeking
10 quiet title to the Property and to obtain equitable relief. Plaintiff claims that the foreclosure of the HOA
11 assessment lien (the "Assessment Lien") extinguished HUD's first security interest in the Property.
12 Plaintiff moved for a temporary restraining order and a preliminary injunction to prevent HUD from
13 conducting its foreclosure sale of its first security interest. Judge Gloria Sturman of the Eighth Judicial
14 District Court, Clark County, Nevada granted a temporary restraining order.

15 Because HUD is a federal entity, it removed this action to federal court and this Court extended
16 the temporary restraining order until the issues could be briefed. On September 10, 2013, this Court
17 dissolved the temporary restraining order and denied the Motion for Preliminary Injunction, stating that
18 the Foreclosure Deed did not reflect a transfer "that would give Plaintiff legal title to the property, free
19 and clear of all encumbrances" (ECF No. 14 at 4). On November 26, 2013, Plaintiff filed an Amended
20 Complaint (ECF No. 23).

21 After this Court dissolved the temporary restraining order, HUD noticed another foreclosure sale
22 for December 19, 2013. Plaintiff appealed denial of the preliminary injunction (ECF No. 19) and,
23 before the sale could proceed, the Ninth Circuit granted the injunction pending a ruling on its appeal of
24 the denial of the Motion for Preliminary Injunction (ECF No. 46). As of January 31, 2014, HUD is
25 owed \$307,774.32 (Exhibit, HUD Statement of Account).

1 HUD now moves to dismiss because Plaintiff's complaint fails to state a claim on which relief
2 can be granted.

3 **III. LEGAL STANDARD**

4 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that
5 fails to state a claim upon which relief can be granted. *See North Star Int'l v. Ariz. Corp. Comm'n*, 720
6 F.2d 578, 581 (9th Cir.1983). Under Rule 12(b)(6), dismissal for failure to state a claim is appropriate
7 only when the complaint does not give the defendant fair notice of a legally cognizable claim and the
8 grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

9 In considering whether the complaint is sufficient to state a claim, the Court takes all material
10 allegations as true and construes them in the light most favorable to the plaintiff. *See NL Indus. v.*
11 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). "However, conclusory allegations of law and unwarranted
12 inferences are not sufficient to defeat a motion to dismiss." *Associated Gen. Contractors of America v.*
13 *Metro. Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir.1998) (citation and internal quotation marks
14 omitted). A motion to dismiss is an appropriate mechanism to challenge the sufficiency of the
15 complaint where a plaintiff's claim is dependent on a particular interpretation of a statute. *See Wilshire*
16 *Westwood Assoc. v. Atl. Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989) (affirming motion to dismiss
17 based on interpretation of petroleum exclusion in CERCLA).

18 "Generally, a district court may not consider any material beyond the pleadings in ruling on a
19 Rule 12(b)(6) motion.... However, material which is properly submitted as part of the complaint may be
20 considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
21 1555 n.19 (9th Cir. 1989) (citations omitted). Similarly, "documents whose contents are alleged in a
22 complaint and whose authenticity no party questions, but which are not physically attached to the
23 pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the
24 motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.
25 1994). Fed. R. Evid. 201(b)(2) allows the court to take judicial notice of matters of public record and
26 other facts not subject to reasonable dispute because they are "capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned.” *Wilshire Westwood*, 881 F.2d at 803 (quoting Fed. R. Evid. 201).

IV. ARGUMENT

A. THE FEDERAL INTEREST IN THE PROPERTY CANNOT BE EXTINGUISHED BY NON-JUDICIAL FORECLOSURE SALE

In its Complaint for quiet title, Plaintiff fails to consider that HUD is a federal entity governed by federal law, and that HUD obtained its interest in the Property through the National Housing Act’s nationwide Home Equity Conversion Mortgage (“HECM”) insurance program. Federal law protects HUD’s first security interest where extinguishment would interfere with federal purposes, or impede or condition implementation of federal policies and programs. Accordingly, Plaintiff’s Complaint fails to state a claim against HUD.

1. The Property and Supremacy Clauses require that federal law, not state law, govern all issues relating to United States’ property, including liens.

The United States Constitution provides “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting ... Property belonging to the United States” U.S. Const. art. IV, § 3, cl. 2. Congress’ power to dispose of property belonging to the United States is “without limitation.” *State of Alabama v. State of Texas*, 347 U.S. 272, 273 (1954).

The Supreme Court defines “property” to include “all other personal and real property rightfully belonging to the United States.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 331 (1936). The Ninth Circuit has held that “[n]o basis in law exists for treating mortgage interests of federal instrumentalities differently from other property of the United States.” *Rust v. Johnson*, 597 F.2d 174, 177 (9th Cir. 1979) (foreclosure sale did not extinguish FNMA’s lien).

When Congress exercises authority under the Property Clause, questions related to “[t]he validity and construction of contracts ..., their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.” *United States v. Allegheny Cnty.*, 322 U.S. 174, 183 (1944) (abrogated on other grounds).

1 Federal law controls these issues by virtue of the Supremacy Clause, which provides that “[t]his
 2 Constitution, and the Laws of the United States, which shall be made in Pursuance thereof ... shall be the
 3 supreme Law of the Land.” U.S. Const. art. VI, cl. 2. “The Supremacy Clause seeks to avoid the
 4 introduction of the disparity, confusion, and conflict which would follow if the Government’s general
 5 authority is subject to local controls.” *Rust*, 597 F.2d at 179 (citing *Allegheny*, 322 U.S. at 183).

6 Plaintiff’s claim for quiet title is squarely within the ambit of the Property and Supremacy
 7 Clauses. The United States’ interest should not be subject to the “confusion and conflict” of Nevada’s
 8 law. Accordingly, federal law, not state law, controls in this case.

9 **2. The Ninth Circuit has held that state rules should not be adopted where a**
 10 **foreclosure would extinguish a lien arising from a national home lending**
 11 **insurance program.**

12 Congress has not specifically indicated whether non-judicial foreclosure of an HOA lien can
 13 divest HUD of its interest in property obtained through the HECM program. In the absence of a
 14 Congressional directive on the disposition of the United States’ property, federal courts “fashion the
 15 governing rule of law according to their own standards.” *United States v. Kimbell Foods, Inc.*, 440 U.S.
 16 715, 726-27 (1979). Courts make a “preliminary determination” about whether “state law should be the
 17 federal rule of decision.” *Rust*, 597 F.2d at 179.

18 In *Kimbell Foods*, the Supreme Court analyzed several factors in determining whether federal
 19 courts should adopt a state rule for determining priority of federal interest in property, and held that state
 20 rules of priority should govern because individual application of state law was possible under the
 21 programs at issue. *Kimbell Foods*, 440 U.S. at 728-29 (adopting state rule of priority for individualized
 22 Farmer’s Home Administration and Small Business Administration loan priority disputes).

23 Shortly after *Kimbell Foods* was decided, the Ninth Circuit decided *Rust v. Johnson*, which
 24 involved an attempt to extinguish a federal interest obtained through a nationwide federal home lending
 25 program. In *Rust*, the City of Los Angeles attempted to foreclose on a property in which the Federal
 26 National Mortgage Association (“FNMA”) had a mortgage interest. The city argued that foreclosure
 was appropriate under a California law allowing non-judicial foreclosure to satisfy its delinquent special

1 assessment for street and lighting improvements, and that it could convey absolute title after the sale.

2 *Rust*, 597 F.2d at 180.

3 The *Rust* court did not take any issue with the validity or priority of the lien, but held that “the
4 real issue in the lawsuit” and the crux of its decision “is that under federal law the improvement lien
5 cannot be enforced without protecting the federal interest.” *Id.* According to the court, the Constitution
6 does not permit the federal lien to be extinguished by foreclosure because “[s]tate legislation must yield
7 under the supremacy clause of the Constitution to the interests of the federal government when the
8 legislation as applied interferes with the federal purpose or operates to impede or condition the
9 implementation of federal policies and programs.” *Id.* at 179.

10 The *Rust* court determined that extinguishment of the federal interest under the state foreclosure
11 scheme “would run the risk of substantially impairing the Government’s participation in the home
12 mortgage market and of defeating the purpose of the National Housing Act.” *Id.* The court noted that
13 Congress had given no indication of intent to have state law govern FNMA’s interest. Further, FNMA
14 was not a party to the original contract, and it did not participate in individual negotiations of
15 specifically tailored loans such that it could accommodate varying state laws. *Id.* at 180. Thus, the result
16 in *Rust* was different from, but consistent with, the result in *Kimbell Foods*. See *Kimbell Foods*, 440
17 U.S. at 728-29 (state rules apply to negotiated, tailored SBA and Farmers Home Administration loans
18 because “each application currently receives individual scrutiny [and] the agencies can readily adjust
19 loan transactions to reflect state priority rules” and because programs indicated a congressional intent to
20 be governed by state law); see also *Chi. Title Ins. Co. v. Sherred Vill. Assoc.*, 708 F.2d 804, 810 (1st Cir.
21 1983) (adopting state rule to determine HUD’s interest in relation to a mechanic’s lien where HUD
22 insured construction project pursuant to a program where “each application already receives extensive
23 individual scrutiny”).

24 . . .

25 . . .

26 . . .

1 **3. Properties in which HUD has an interest are not subject to non-judicial**
 2 **foreclosure of a delinquent HOA assessment lien.**

3 The analysis in *Rust* and *Kimbell Foods* has been applied in two closely related cases where an
 4 HOA sought non-judicial foreclosure of a property where the United States obtained an interest through
 5 national programs designed to insure mortgages for underserved groups. *See Yunis v. United States*, 118
 6 F. Supp. 2d 1024, 1028-29 (C.D. Cal. 2000) (VA lending program) and *Sec’y of Hous. and Urban Dev.*
 7 *v. Sky Meadow Ass’n*, 117 F. Supp. 2d 970 (C.D. Cal. 2000) (HUD lending program).²

8 In *Sky Meadow*, HUD insured a home loan between a private lender and a borrower under the
 9 Single Family Mortgage Insurance Program. *Id.* After default, HUD obtained title to the property. The
 10 HOA recorded a Notice of Delinquent Assessment and eventually sold the property to the HOA’s
 11 president at a non-judicial sale for \$1,500.00. *Id.* The property was sold again for \$63,000.00. *Id.* HUD
 12 filed a quiet title suit, and argued that the non-judicial foreclosure sale could not eliminate its interest. *Id.*

13 The HOA argued that *Rust*’s requirement of protecting a federal interest in a property did not
 14 apply because the City of Los Angeles – a governmental entity – initiated the foreclosure sale. The
 15 HOA argued that “even though a state or local government cannot ‘convey absolute title in derogation of
 16 the federal interest,’ a private homeowners association can do so when it non-judicially forecloses on the
 17 federal government’s interest in the property.” *Id.*, quoting *Rust* at 179. The district court flatly rejected
 18 this argument. The court held that allowing an HOA to do what the City of Los Angeles could not was
 19 not tenable. “In order for a state or a private party to proceed in such a manner there must be express
 20 congressional approval.” *Id.* at 977.

21 The *Sky Meadow* court then applied the analysis of *Rust* and *Kimbell Foods* to determine that the
 22 non-judicial foreclosure was invalid. First, it determined that a uniform law was desirable because,
 23 although Congress had not expressly spoken on whether a California non-judicial foreclosure of an
 24 HOA assessment lien could divest the government of property obtained under the statutory scheme: “It
 25 is doubtful, here, that Congress in enacting the Single Family Mortgage Insurance Program, intending
 26

² The same district court issued these decisions on the same day and the opinions are nearly identical.

1 ‘the outcome to depend upon varying characterizations of state law.’” *Sky Meadow*, 117 F. Supp. 2d at
 2 976, citing *United States v. Lewis Cnty.*, 175 F.3d 671, 677 (9th Cir.1999), *cert. denied* 528 U.S. 1018
 3 (1999) (state law did not control determination of property taxes on land obtained through Farm
 4 Services Agency lending program).

5 The *Sky Meadow* court next determined that “a foreclosure sale of HUD’s property will frustrate
 6 the purpose of the program, i.e. to insure home loans extended by private lenders to enable low to
 7 moderate income buyers to purchase a home.” *Id.* The court noted that “[i]f HUD is circumscribed in
 8 its ability to replenish the Mutual Mortgage Insurance Fund, then its ability to facilitate home ownership
 9 by eligible individuals is limited” and that “application of state law as the federal rule of decision would
 10 interfere with the statutory mission of HUD.” *Id.* at 980-81.

11 Finally, the court noted “that [the HOA] could have sued the United States under the ‘sue and be
 12 sued’ clause found in the statute and collected the past due assessment fees.” *Id.* at 979, citing 12 U.S.C.
 13 § 1702. This ability to sue for delinquent assessments prevented undue disruption of the HOA’s
 14 commercial activity. The court noted that the HOA was unlike the creditors in *Kimbell Foods*, who
 15 “had no ability to sue the government to collect their debts, if the federal government’s liens rendered
 16 the creditor liens less valuable.” *Id.*

17 After determining that federal law applied and that the state rule of decision should not be
 18 adopted, the court held that the non-judicial foreclosure could not have divested HUD’s property interest
 19 because “Congress has stated that the Secretary of HUD must dispose of HUD owned property in a
 20 manner that expands home ownership opportunities, strengthens neighborhoods and communities, and
 21 ensures a maximum return to the mortgage insurance fund.” *Id.* at 981, citing 24 C.F.R. § 291.1(a)(2).

22 **4. This Court should not adopt state law as the federal rule of decision.**

23 Because there is no specific congressional directive on the disposition of HUD’s lien on the
 24 Property, the Court must determine whether it should adopt the state rule of decision. Plaintiff’s
 25 Complaint depends on this Court not only adopting Nevada law as the federal rule of decision, but also
 26 on it adopting Plaintiff’s problematic interpretation of NRS 116.3116.

1 In *Rust* and *Kimbell Foods*, the courts considered several factors in determining whether federal
 2 courts should adopt a state rule of decision to govern federal programs. The courts considered (1)
 3 congressional intent to have state law govern the federal interest; (2) whether the interest was obtained
 4 through a program that allows loans to be individually tailored; (3) whether there is a need for a
 5 nationally uniform body of law; and (4) “the extent to which application of a federal rule would disrupt
 6 commercial relationships predicated on state law.” *Kimbell Foods*, 440 U.S. at 728-29; *Rust*, 597 F.2d
 7 at 180.

8 ***a. Congressional intent to have state law govern the federal program***

9 Where Congress has not expressed intent to have state law govern the federal program, courts
 10 should adopt a rule that protects the federal interest. *Rust*, 597 F.2d at 180 (“This is not a case where
 11 Congress has allowed the federal interest to be subject to state law.”). Congress has not indicated intent
 12 that state law govern HUD’s HECM program. *See generally* 24 C.F.R. § 206.1.

13 ***b. Interest obtained through individually tailored loans***

14 Courts should adopt a federal rule of decision protecting federal interests obtained through
 15 programs that do not include individual loan negotiation and tailoring. *Rust*, 597 F.2d at 180 (“FNMA
 16 ... has little or no contact with its mortgagors and it does not individually negotiate the mortgage
 17 contracts it receives.”).

18 HUD does not negotiate insurance arrangements with individual mortgagors when insuring
 19 single-family residential loans. *See generally* 24 C.F.R. § 206.1. Under the HECM program, HUD
 20 insures mortgages issued by approved mortgagees in compliance with national standards, and does not
 21 individually tailor or negotiate the underlying. *Id.*

22 ***c. A nationally uniform body of law is necessary***

23 Much like the programs in *Rust*, *Sky Meadow*, and *Yunis*, the underlying loan at issue in this case
 24 was insured through a nationwide program for insuring home mortgages for underserved borrowers. As
 25 of 2011, HUD’s HECM program insures more than 580,000 properties nationwide. *See* Report to
 26

1 Congress on Reverse Mortgages, June 2012,³ at p.14.

2 The HECM program is a national loan insurance program similar to the FNMA insurance
3 program at issue in *Rust*, and closely related to the Single Family Mortgage Insurance Program at issue
4 in *Sky Meadow* (where the court held federal property should not be subject to varying characterizations
5 of state law). In fact, both HECM and the Single Family Mortgage Insurance Program are underwritten
6 by the same insurance fund. Accordingly, as in *Rust* and *Sky Meadow*, there is a compelling need for a
7 nationally uniform body of law governing extinguishment of HUD's interest obtained through the
8 program.

9 ***d. Application of state law would frustrate the specific objectives of the HECM***
10 ***program***

11 Pursuant to the National Housing Act, HUD's HECM program is designed:

12 (1) to meet the special needs of elderly homeowners by reducing the effect of the
13 economic hardship caused by the increasing costs of meeting health, housing, and
14 subsistence needs at a time of reduced income, through the insurance of home equity
conversion mortgages to permit the conversion of a portion of accumulated home
equity into liquid assets; and

15 (2) to encourage and increase the involvement of mortgagees and participants in the
16 mortgage markets in the making and servicing of home equity conversion mortgages
for elderly homeowners.

17 12 U.S.C. § 1715z–20(b)(1); 24 C.F.R. § 206.33.

18 The HECM program makes lending to elderly homeowners more attractive by insulating lenders
19 from risk. *See* 12 U.S.C. § 1715z–20(a). The Mutual Mortgage Insurance fund, which underwrites the
20 HECM program, is under severe stress. *See* Annual Report to Congress Fiscal Year 2012 Financial
21 Status FHA Mutual Mortgage Insurance Fund, November 16, 2012,⁴ at p. 8).

22 Adopting Plaintiff's interpretation of NRS 116.3116 would severely frustrate the objectives of
23 the HECM program by preventing HUD from replenishing the Mutual Mortgage Insurance fund and,
24 like the attempt to extinguish the government's lien in *Rust*, "run the risk of substantially impairing the
25

26 ³Available at http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf.

⁴ http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-171.

Government's participation in the home mortgage market and ... defeat[] the purpose of the National Housing Act." *Rust*, 597 F.2d at 179.

e. Application of a federal rule would not disrupt commercial relationships predicated on state law

The HOA's Assessment Lien on the Property was \$6,039.70 and Plaintiff paid \$10,600.00 for the Property. HUD's first security interest on the Property is \$307,774.32. Under Plaintiff's interpretation of state law, it could obtain clear title to the Property for approximately 3% of its value, while the already beleaguered Mutual Mortgage Insurance fund suffered a massive loss. Even if state law provided for such an unreasonable outcome, this Court should not adopt it as the federal rule of decision.

Federal law governs in this case and the Court is entitled to select an appropriate rule of decision. The Court should not adopt Plaintiff's interpretation of NRS 116.3116 as the rule of decision in this case.

5. The Court should adopt a rule that requires judicial sale.

Since a federal rule is appropriate in this situation, the Court must "fashion the governing rule of law according to [its] own standards." *Kimbell Foods*, 440 U.S. at 726-27. Where the conflict between federal interests and the operation of state law is relatively narrow, courts may decide "only particular elements of state law are superseded." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508 (1988) (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595, (1973)). *Rust* followed this narrow approach: "We are not concerned with the authority of the City to make the assessment or with the priority under state law of the street improvement lien.... What we have decided is that under federal law the improvement lien cannot be enforced without protecting the federal interest." *Rust*, 597 F.2d at 180.

When crafting the federal rule of decision, a court may look to analogous federal statutes. *Seagate Tech. LLC. v. Dalian China Exp. Int'l Corp. Ltd.*, 169 F. Supp. 2d 1137, 1142 (N.D. Cal. 2001) (citing 19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, §

1 4518) (discussing the inquiry federal courts must make in determining the content of federal common
2 law). A closely analogous federal statute supplies a clear rule of decision that this Court should adopt.

3 28 U.S.C. § 2410 provides a limited waiver of sovereign immunity and allows the United States
4 to be named in suits to, *inter alia*, foreclose a lien on or quiet title to property on which the United States
5 has a lien. This statute mandates that “an action to foreclose a mortgage or other lien, naming the
6 United States as a party under this section, *must seek judicial sale*.” 28 U.S.C. § 2410(c) (emphasis
7 added).

8 This Court should adopt a federal rule of decision that prevents an HOA from extinguishing a
9 lien obtained through HUD’s HECM program without judicial sale. This federal rule of decision is
10 entirely consistent with a majority of state law cases holding that when an HOA initiates “a non-judicial
11 foreclosure [under NRS 116.3116] to recover delinquent assessments . . . the purchaser at the sale takes
12 the property subject to the [first] security interest.” *Diakonos Holdings, LLC v. Countrywide Home*
13 *Loans, Inc.*, No. 2:12-CV-00949-KJD, 2013 WL 531092 (D. Nev. Feb. 11, 2013); see also *SFR*
14 *Investments Pool 1, LLC v. DHI Mortg. Co., Ltd.*, 2013 WL 5778527 (Nev. Dist. Ct.) (Trial Order)
15 (NRS 116.3116(2) “specifies the association’s lien is junior to the first security interest at least until an
16 “action” is commenced.”).

17 A rule that HUD’s lien on the Property cannot be extinguished without a judicial sale is
18 consistent with existing federal and state law, adequately protects the federal interest as required by
19 *Rust*, and preserves the HOA’s assessment lien. Application of this federal rule leads to just results.
20 The HOA lien purchaser will not reap an inordinate windfall, HOAs can collect past due fees and the
21 HECM program will serve its intended purpose of helping elderly Americans. Applying the state rule as
22 interpreted by Plaintiff would result only in Plaintiff’s unjust enrichment.

23 **B. PLAINTIFF CANNOT QUIET TITLE IN ITS FAVOR BECAUSE IT TOOK THE**
24 **PROPERTY SUBJECT TO HUD’S FIRST SECURITY INTEREST**

25 The Court should dismiss Plaintiff’s Complaint for quiet title because the plain and unambiguous
26 language of NRS 116.3116 states that non-judicial foreclosure of an HOA assessment lien does not

1 extinguish the first security interest, because the HOA never perfected its security interest by initiating
 2 an action, and because Plaintiff does not plead that the HOA's lien precedes the deed of trust.

3 **1. Foreclosure of an assessment lien created by NRS 116.3116 does not extinguish**
 4 **HUD's Deed of Trust.**

5 Nevada has enacted a statutory scheme that gives HOAs "immediate liens against real property
 6 when HOA assessments or other costs against a unit become delinquent." *Bayview Loan Servicing, LLC*
 7 *v. Alessi & Koenig, LLC*, No. 2:13-CV-00164-RCJ, 2013 WL 2460452 at *3 (D. Nev. June 6, 2013),
 8 *reconsideration denied* 2013 WL 3943915 (D. Nev. July 8, 2013). NRS 116.3116 provides that an
 9 HOA lien is prior to all other liens and encumbrances. However, the statute carves out an important
 10 exception to the HOA lien's priority for "a first security interest on the unit recorded before the date on
 11 which the assessment sought to be enforced became delinquent...." NRS 116.3116(2)(b).

12 The exception in subpart (2)(b), preserving the priority of the first security interest, has one
 13 caveat: the HOA assessment lien has limited super priority over the first security interest "to the extent
 14 of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the
 15 assessments for common expenses based on the periodic budget adopted by the association pursuant to
 16 NRS 116.3115, which would have become due in the absence of acceleration during the 9 months
 17 immediately preceding institution of an action to enforce the lien...."⁵ NRS 116.3116(2)(c).

18 **2. An HOA non-judicial foreclosure is not an "action" giving rise to a super-**
 19 **priority lien.**

20 The language of the statute creating the HOA's super-priority lien for nine months of
 21 assessments is clear: the nine-month portion of the HOA lien attains super-priority upon the "institution
 22 of action to enforce the lien." *See* NRS 116.3116(2)(c). Statutory terms are generally interpreted
 23 according to their ordinary meaning unless otherwise defined in the statute. *Perrin v. United States*, 444
 24 U.S. 37, 42 (1979). The term "action" in the ordinary sense means to file or bring a lawsuit. *See, e.g.,*

25 ⁵ Section 116.310312 concerns HOA fines and costs imposed when an HOA must maintain the exterior
 26 of a unit in accordance with the CC & R or remove or abate a public nuisance on the exterior of the unit
 where the unit owner has failed to do so. *See id.* § 116.310312(2). Section 116.3115 governs regular
 HOA dues. *See id.* § 116.3115.

1 Fed. R. Civ. P. 2 and 3; *see also Seaborn v. First Judicial Dist. Court*, 29 P.2d 500, 505 (Nev. 1934)
 2 (“An ‘action’ is a judicial proceeding, either in law or equity, to obtain certain relief at hands of court”);
 3 *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (“The key terms in this provision – ‘action’ and
 4 ‘complaint’ – are ordinarily used in connection with judicial, not administrative, proceedings”); Black’s
 5 Law Dictionary (8th ed. 2004) (the phrase “bring an action” is defined as “to sue; institute legal
 6 proceedings”).

7 Other portions of NRS 116.3116 use “action” to mean a judicial proceeding. Specifically, NRS
 8 116.3116(7) states “[a] judgment or decree in any **action** under this section must include costs and
 9 reasonable attorney’s fees for the prevailing party.” (emphasis added). Similarly, NRS 116.3116(10)
 10 provides that “[i]n an **action** by an association to collect assessments or to foreclose a lien created under
 11 this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to
 12 be due and owing to a unit’s owner before commencement or during pendency of the action.” (emphasis
 13 added). The plain meaning and the context of the term “action” under NRS 116.3116 therefore means to
 14 commence or institute a lawsuit or judicial action.

15 Consistent with the plain language of the statute, several Nevada courts have held that NRS
 16 116.3116 requires the HOA to commence a judicial action to establish the super-priority portion of its
 17 lien. *See, e.g., SFR Inv. Pool 1, LLC v. DHI Mortg. Co., Ltd.*, No. 12A675799, 2013 WL 5778527 (Dist.
 18 Ct. Nev. Sept. 13, 2013) (Trial Order); *SFR Inv. Pool 1, LLC v. Nat’l City Bank*, No. 13A676349, 2013
 19 WL 5778584 (Dist. Ct. Nev. Sept. 25, 2013) (Trial Order); *Paradise Harbor Place Trust v. Selene Fin.,*
 20 *LP*, No. 13A675032, 2013 WL 5778547 (Dist. Ct. Nev. Sept. 13, 2013) (Trial Order).

21 When the HOA initiates “a non-judicial foreclosure to recover delinquent assessments . . . the
 22 purchaser at the sale takes the property subject to the [first] security interest.” *See Diakonos Holdings,*
 23 2013 WL 531092. In this case, Plaintiff obtained its title after the HOA sold the Property at a non-
 24 judicial foreclosure sale based on the lien granted it by NRS 116.3116(1). The express terms of NRS
 25 116.3116(2)(b) preserve the seniority of HUD’s first security interest for all purposes unless there is an
 26 “action to enforce the lien.” Because the HOA never commenced an action, the nine-month portion of

1 the HOA's lien never obtained super-priority and HUD's first security interest is not disturbed.

2 Accordingly, Plaintiff's claim to quiet title fails as a matter of law.

3 **3. Plaintiff fails to state a claim because Nevada courts have repeatedly held that**
 4 **foreclosure of an assessment lien does not extinguish the first security interest.**

5 Plaintiff's claim to quiet title and other relief is entirely dependent on its assertion that the
 6 HOA's foreclosure on its Assessment Lien extinguished HUD's Deed of Trust. The majority of federal
 7 courts that have dealt with this question have held that non-judicial foreclosure of an HOA lien does not
 8 extinguish the first security interest. *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP*, No.
 9 2:13-CV-895-JCM-GWF, 2013 WL 4048573 at *3 (citing *Diakonos Holdings*, 2013 WL 531092);
 10 *Beverly v. Weaver-Farley*, 3:13-CV-0348-LRH-VPC, 2013 WL 5592332 (D. Nev. Oct. 9, 2013);
 11 *Bayview Loan Servicing*, 2013 WL 2460452; *Weeping Hollow Ave. Trust v. Spencer*, No. 2:13-CV-
 12 00544-JCM, 2013 WL 2296313 (D. Nev. May 24, 2013); *Kal-Mor-USA, LLC v. Bank of America*,
 13 *N.A.*, No. 2:13-CV-0680-LDG, 2013 WL 3729849 (D. Nev. July 8, 2013) (denying preliminary
 14 injunction and granting dismissal and summary judgment); *First 100, LLC v. Wells Fargo Bank, N.A.*,
 15 No. 2:13-CV-431-JCM, ECF 29 (D. Nev. April 30, 2013) (denying motion for temporary restraining
 16 order). *But see SFR Inv. Pool I, LLC v. Wells Fargo Bank, N.A.*, No. 2:13-CV-01153-APG, ECF 32
 17 (D. Nev. July 25, 2013) (granting a preliminary injunction in favor of the HOA); *7912 Limbwood Court*
 18 *Trust v. Wells Fargo Bank, N.A.*, 2:13-CV-00506-PMP, 2013 WL 5780793 (D. Nev. Oct. 28, 2013)
 19 (denying a motion to dismiss filed by the first security interest holder).

20 *Premier One Holdings* is typical of these decisions. There, the defendant held a deed of trust
 21 securing a delinquent note for \$305,000.00. Plaintiff bought the property at an HOA foreclosure sale for
 22 \$13,700.00 and sued to quiet title in its favor, arguing that NRS 116.3116 operated to extinguish
 23 defendant's deed of trust. The court (Mahan, J.) held that "the plain and clear meaning of the statute is
 24 that it affords an HOA a super priority lien of nine months of delinquent assessments, but nothing more
 25 than that." *Premier One Holdings*, 2013 WL 4048573 at *3. The court further held that "to construe
 26 NRS 116.3116 to permit an HOA foreclosure to extinguish a first position deed of trust would be an

absurd result.” *Id.* at *4. The court noted that such an interpretation is impractical and potentially violates due process because an HOA assessment is usually a small amount compared to the note and usually arises long after the note is recorded. *Id.* The court also noted that such an interpretation would unjustly favor the party with the least risk, would pressure banks to foreclose at the first sign of distress, and could ultimately lead to a serious reduction in lending. *Id.*

State courts have likewise repeatedly rejected Plaintiff’s argument. *Id.* at *3 (“most state courts have agreed with the interpretation of the federal courts”); *see, e.g., Order Den. Mot. for Prelim. Inj., Oliver Sage Drive Trust v. BAC Home Loan Servicing LP*, No. A-13-674872-C (Dist. Ct. Nev. Mar. 28, 2013) (holding that buyer at a foreclosure for delinquent common homeowners association assessments purchases a possessory right to the property subject to a first security interest) (ECF 8, Ex. B); *Order Den. Mot. for Prelim. Inj. and Granting Counter-Mot. to Dismiss, SFR Investments Pool 1, LLC v. US Bank, N.A.*, No. A-12-673671-C (Dist. Ct. Nev. Mar. 22, 2013) (noting that both state and federal constitutional due process guarantees offended if first security interest may be voided by non-judicial foreclosure for an assessment lien and holding that only a judicial foreclosure may extinguish a first security interest) (ECF 8, Ex. C); *Order Den. Mot. for Prelim. Inj., SFR Investments Pool 1, LLC v. First Horizon Home Loans*, No. A-13-674958-C (Dist. Ct. Nev. May 15, 2013) (denying SFR Investment’s motion for a preliminary injunction on arguments concerning extinguishing first deed of trust security interest at association foreclosure sale for delinquent common assessments) (ECF 8, Ex. D); *Order Granting Mot. to Dismiss Compl. and Cross-Compl., French v. Sweetwater Homeowners Ass’n, Inc.*, No. A-12-667931-C (Dist. Ct. Nev. Apr. 26, 2013) (granting motion to dismiss SFR Investment’s crosscomplaint and holding judicial foreclosure necessary to extinguish a first deed of trust at a foreclosure sale for delinquent common homeowners association assessments) (ECF 8, Exh. E). By contrast, Plaintiff does not cite, and HUD has not found, any case where a court has quieted title in favor of a party based on an assertion that an NRS 116.3116 assessment lien extinguished a prior recorded deed of trust, although some judges in state court have granted preliminary injunctions or refused to dismiss quiet title actions based on this claim. *See, e.g., First 100, LLC, v. Burns*, No. A-13-677693-C

(Dist. Ct. Nev. May 31, 2013) (denying motion to dismiss) (ECF 8, Ex. F); *Premier One Holdings*, 2013 WL 4048573 at *3 (acknowledging contrary state court opinions).

Plaintiff's claim to quiet title depends on an interpretation of NRS 116.3116 that extinguishes the first security interest. In its Complaint, Plaintiff acknowledges that HUD has a first security interest. There is no dispute that HUD's interest is covered by the exception to the priority of an assessment lien for first security interest as reflected in subpart (2)(b). Therefore, for Plaintiff's claim to succeed, the caveat to the exception – the super-priority portion for nine months of delinquent assessments provided in subparagraph 2(c) – must operate to extinguish the first security interest protected by the original exception. This interpretation of NRS 116.3116 would render the exception meaningless. *See Bayview Loan Servicing*, 2013 WL 2460452 at *5 (allowing super priority exception to extinguish lien would render first security interest exception meaningless). Accordingly, Plaintiff is unable to state a legally cognizable claim that NRS 116.3116 extinguishes HUD's lien, and the Complaint should be dismissed.

4. The Court should dismiss Plaintiff's complaint because the assessment lien was not recorded before the Deed of Trust.

A plaintiff seeking to quiet title obtained through foreclosure of an HOA assessment lien must allege that the assessment lien chronologically precedes the recording of the deed of trust. *Centeno v. Mortgage Elec. Registration Sys.*, No. 2:11-CV-02105-GMN, 2012 WL 3730528 at *3 (D. Nev. Aug. 28, 2012) (dismissing claim that an "HOA Trustee Sale" occurred 'in favor of plaintiff,' which 'has cancelled or wiped out'" a defendant's Deed of Trust); *see also Kal-Mor-USA, L.L.C.*, 2013 WL 3729849 (HOA foreclosure did not extinguish first security interest because deed of trust was recorded almost seven years prior to NRS 116.3116 assessment lien). Without that allegation, a plaintiff cannot state a claim for quiet title because NRS 116.3116(2)(b) expressly says that an assessment lien recorded by an HOA subsequent in time to the deed of trust only creates a super priority lien for nine months of assessments. NRS 116.3116(2)(3). *Id. citing Centeno*, 2012 WL 3730528 at *3; *see also Weeping Hollow Ave. Trust*, 2013 WL 2296313, at *5 (denying motion for temporary restraining order and dismissing quiet title claim because Plaintiff could not allege in good faith that assessment lien predated

1 deed of trust).

2 The Assessment Lien on the Property was recorded in October, 2012, more than seven years
3 after HUD's Deed of Trust was recorded. Plaintiff fails to allege in the Complaint that the Assessment
4 Lien on the Property predates the Deed of Trust. Plaintiff's claim to quiet title does not meet the
5 standard of plausible pleading required to survive a motion to dismiss. *Centeno*, 2012 WL 3730528 at
6 *3.

7 **V. CONCLUSION**

8 Plaintiff's Complaint asks this Court to determine that the non-judicial foreclosure of the HOA
9 assessment lien extinguished HUD's first security interest. Because HUD is a federal entity governed
10 by federal law, however, this Court must adopt a federal rule of decision that protects the federal
11 interest. Further, even under state law, Plaintiff fails to state a claim because the plain language of NRS
12 116.3116 preserves the first security interest after a non-judicial foreclosure of an HOA lien.

13 Accordingly, HUD requests that the Complaint be dismissed.

14 Respectfully submitted this 3rd day of February 2014.

15 DANIEL G. BOGDEN
16 United States Attorney

17 /s/ Troy K. Flake
18 TROY K. FLAKE
19 Assistant United States Attorney
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PROOF OF SERVICE

I, Troy K. Flake, certify that the following individual was served with copies of **MOTION TO DISMISS** on February 3, 2014, by the below identified method of service:

CM/ECF:

Aaron R. Dean, Esq.
THE DEAN LEGAL GROUP, LTD.
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/s/ Troy K. Flake
TROY K. FLAKE
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